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No. 96-1853

In the Supreme Court of the United States

OCTOBER TERM, 1996

BURLINGTON NORTHERN RAILROAD COMPANY, PETITIONER

v.

ESTATES OF RED WOLF AND BULL TAIL, VALERIE RED WOLF, GLADYS RED WOLF, RANDY RED WOLF, DORRIE BULL TAIL, DEWEY BULL TAIL, AND RON ARNESON, CROW TRIBAL COURT SPECIAL JUDGE, RESPONDENTS

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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TABLE OF AUTHORITIES

Cases: *Page*

Burlington Northern RR Co. v. Blackfeet Tribe,
924 F.2d 899 (9th Cir. 1991),
cert. denied, 505 U.S. 1212 (1992) 7

Harrison v. NAACP,
360 U.S. 167 (1959) 1

Iowa Mutual Ins. Co. v. LaPlante,
480 U.S. 9 (1987) 2, 3

Lawrence v. Chater, 116 S.Ct. 604 (1996) 5

Montana v. United States, 450 U.S. 544 (1981) ..... *passim*

National Farmers Union Ins. Cos. v. Crow Tribe,
471 U.S. 845 (1985) 1, 2

Strate v. A-1 Contractors,
117 S.Ct. 1404 (1997) ..... *passim*

Strate v. A-1 Contractors, 117 S.Ct.1404 (1997), requires reversal of the Ninth Circuit's decision in this case or, at the very least, a GVR to enable the Ninth Circuit to reconsider its decision in light of *A-1 Contractors*. *A-1 Contractors* calls the Ninth Circuit's decision into question for two reasons. First, *A-1 Contractors* makes clear that the tribal court exhaustion doctrine cannot be applied, as it was in this case, in a rigid and mechanical fashion; instead, the Court described the exhaustion doctrine as a "prudential" rule requiring a flexible analysis of the practical consequences of abstention. 117 S.Ct. at 1413. *A-1 Contractors* also makes clear that the Ninth Circuit was wrong in assuming that exhaustion of tribal court remedies is mandatory unless the party seeking relief in the federal court can fit within the literal language of one of the three "exceptions" listed in footnote 21 of *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985).

A-1 Contractors itself recognizes that, in addition to the situations catalogued in footnote 21 of *National Farmers Union*, exhaustion of tribal court remedies is not required where the lack of tribal court jurisdiction is "plain" and requiring exhaustion of tribal court remedies would therefore "serve no purpose other than delay." 117 S.Ct. at 1416 n.14. The reasoning in *A-1 Contractors* strongly suggests that other "exceptions" may also be appropriate. At the very least, this case should be remanded to allow the Ninth Circuit to consider whether long-standing principles that allow a federal court to grant interim relief even if it must otherwise abstain in deference to a state proceeding should also be applied in the context of tribal court proceedings.[1]

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[1] In *Harrison v. NAACP*, 360 U.S. 167, 178-79 (1959), this Court held that a federal district court could issue an injunction to protect a plaintiff's federal rights even if it was required to abstain from deciding the ultimate merits pending the outcome of state court proceedings. So too in this case,

Second, this is precisely the kind of case contemplated by footnote 14 of *A-1 Contractors*, where it is "plain" that the Crow Tribe has no power to govern BN's conduct on its federally granted right-of-way and that the Crow Tribal Court therefore lacks subject matter jurisdiction over the *Red Wolf* case. Under these circumstances, BN was not required to exhaust its tribal court remedies before seeking a determination from the federal court that the tribal court judgment was void. Because the district court could have properly ruled on the merits of BN's complaint, it necessarily follows that it did not abuse its discretion in taking the much more limited step of enjoining enforcement of the tribal court judgment pending review.[2]

In opposing BN's Petition, respondents simply refuse to acknowledge the Court's reasoning in *A-1 Contractors*. Notwithstanding the Court's clear announcement of a new "exception" to the exhaustion doctrine in footnote 14 of *A-1 Contractors*, the *Red Wolf* plaintiffs contend that *A-1 Contractors* "did not change the mandatory nature of the exhaustion rule, nor did it change the exceptions." (Pl. Opp. at 13).

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even if the federal court was required to abstain from ruling on the federal question of tribal court jurisdiction until all tribal court remedies were exhausted, the federal court still had the power to grant interim injunctive relief to protect substantial federal interests in interstate commerce.

[2] The *Red Wolf* plaintiffs argue that the district court was required to abstain and therefore did not have subject matter jurisdiction over BN's complaint. (Pl. Opp. at 1 n.1). In *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 853 (1985), however, this Court held that the scope of tribal court jurisdiction is a federal question that gives rise to federal jurisdiction under 28 U.S.C. § 1331. And in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 16 n.8 (1987), the Court emphasized that "the exhaustion rule enunciated in *National Farmers Union* did *not* deprive the federal courts of subject matter jurisdiction. Exhaustion is required as a matter of comity, not as a jurisdictional prerequisite." (Emphasis added).

Similarly, Judge Arneson completely ignores footnote 14 of *A-1 Contractors* when he argues that under *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 17 (1987), exhaustion is still required even if the jurisdictional facts in *Red Wolf* are indistinguishable from those in *A-1 Contractors*. (Arneson Opp. at 9). Respondents also offer numerous purported distinctions between the jurisdictional facts in *Red Wolf* and those in *A-1 Contractors*, in the apparent hope of taking this case out of the category of cases described in footnote 14 of *A-1 Contractors*, where exhaustion of tribal court remedies is not required. As demonstrated below, all of these arguments should be rejected.

1. Respondents argue that the Ninth Circuit properly adopted a mandatory rule of exhaustion under which a federal court would *never* be permitted to "interfere" in ongoing tribal court proceedings—no matter what rights or federal interests were at stake. (Arneson Opp. at 5). Thus, in respondents' view, unless and until the Crow Court of Appeals issues a final ruling on jurisdiction, the federal district court is powerless to take any action, no matter how limited it may be, to protect BN's interstate rail operations. To the extent the Ninth Circuit's decision can be read to adopt such an expansive exhaustion rule, it is clearly in conflict with the more flexible approach in *A-1 Contractors*.

Respondents try to justify a broad rule of exhaustion by citing what they describe as the "procedural nightmare" created by the district court's injunction in this case. In fact, however, the district court's order did not cause any confusion, nor was there any interruption in the post-trial or appeal process in the Crow courts. In any event, as this Court recognized in *A-1 Contractors*, it is all too often the exhaustion doctrine itself that creates a procedural nightmare, forcing non-Indian defendants to spend years litigating in an unfamiliar tribal court before they are able to seek federal court review of the federal question of whether the tribal court has jurisdiction over the dispute.

This is just such a case. Unlike the tribal court in *A-1 Contractors*, the Crow courts do not permit an interlocutory appeal from a decision upholding tribal court jurisdiction. As a result, BN has been unable, despite almost three years' effort, to obtain a final determination from the tribal courts on the issue of subject matter jurisdiction. Under respondents' view of the exhaustion doctrine, BN would be required not only to wait another year or more for its appeal to be decided by the Crow Court of Appeals, but also to choose between posting a $30 million bond in tribal court—with all the expense and risks that entails—and facing the possible destruction of its property on the reservation.[3] Respondents have not offered any sensible reason for imposing that kind of extraordinary burden on a non-Indian defendant in a case where it is clear, following *A-1 Contractors,* that the tribal court judgment lacks subject matter jurisdiction.

2. Moreover, it is not at all clear that the Ninth Circuit intended to adopt the expansive view of exhaustion respondents advocate. The court's opinion can be read as holding only that BN failed to exhaust its remedies on the issue of interim relief by failing to secure a "final ruling" from the Crow Court of Appeals "on the form and amount of security that would suffice to stay the judgment" pending appeal. *See* Pet. App. at 7a. If that is what the Ninth Circuit meant, any failure to exhaust has been cured because the Crow Court of Appeals has now issued a final order on that precise issue. On June 17, 1996, the court

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[3] The *Red Wolf* plaintiffs point to the fact that payment of the tribal court bond would be conditioned on exhaustion of BN's right to federal court review. (Pl. Opp. at 22). But, as demonstrated in BN's Petition, plaintiffs themselves have argued that federal court review does *not* include a review of any alleged deprivation of due process. Plaintiffs do not quarrel with BN's argument that without the federal court injunction BN would be forced to choose between protecting its property on the reservation from seizure and protecting its right to challenge the judgment outside the tribal courts on due process grounds.

issued its "Opinion and Order on Surety Bond" stating that after the tribal court enters the reduced judgment of $25 million, BN must post a $30 million bond in the tribal court in order to secure a stay of the judgment. (Arneson App. 12a). The entry of that Order is enough, in and of itself, to justify vacating and remanding the decision below to allow the Ninth Circuit to decide whether BN has exhausted its tribal court remedies and, if so, whether the entry of the preliminary injunction was an abuse of discretion. *See Lawrence v. Chater*, 116 S.Ct. 604, 606 (1996) (noting that the Court has "GVR'd in light of a wide range of developments, including ... changed factual circumstances").

3. Respondents also oppose BN's Petition on the ground that the jurisdictional facts in the *Red Wolf* case are distinguishable from those in *A-1 Contractors*. In fact, however, this case is on all fours with *A-1 Contractors*.

a. The first question that must be answered under the jurisdictional analysis in *A-1 Contractors* is whether the land where the accident occurred should be deemed the equivalent of the "non-Indian fee lands" in *Montana v. United States*, 450 U.S. 544 (1981). Respondents claim that the State highway where the accident occurred in *A-1 Contractors* met this requirement because it was "undeniably owned by the state."[4] They argue that *Red Wolf* is distinguishable because the Crow Tribe retains ownership of the land beneath the BN right-of-way. But respondents are simply wrong about the facts in *A-1 Contractors*. Just like the Crow Tribe, the Three Affiliated Tribes in *A-1 Contractors* continued to own the land underneath the highway. *See* 117 S.Ct. at 1413 ("the land underlying the scene of the accident [was] held in trust for the [tribes]").

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[4] *See* Pl. Opp. at 13; Arneson Opp. at 10 (arguing that in *A-1 Contractors* the tribes' title to the underlying land had been "extinguished" by the grant of the right-of-way).

Indeed, that ownership interest was in many ways the centerpiece of the tribal court plaintiff's case in *A-1 Contractors*: she argued, just as respondents do here, that "because the Tribe retains its beneficial ownership of the land, the [state's] easement has no bearing either on federal protection or jurisdiction." Petitioners' Reply in *A-1 Contractors* at 3.

The Court rejected the argument that ownership of the land was a controlling or even a relevant factor in the analysis, holding that the critical issue was whether the tribe had given up the right to exclude nonmembers from the right-of-way. The Court concluded that by consenting to a permanent easement without retaining any "gate-keeping right," the Tribes in *A-1 Contractors* had given up a "landowner's right to occupy and exclude" others from the right-of-way; under those circumstances, the right-of-way was "align[ed]" with "land alienated to non-Indians" and therefore governed by the presumption against tribal jurisdiction over nonmembers established in *Montana*. 117 S.Ct. at 1414. The same is clearly true here, where the Crow Tribe, by consenting to the railroad right-of-way, gave up its right to exclude others from using that particular strip of land.

Respondents also try to avoid the conclusion that the *Montana* test applies by arguing that plaintiffs' decedents may have been traveling on a tribal road as they crossed the railroad right-of-way. (Pl. Opp. at 13). Nothing in *A-1 Contractors*, however, suggests that the Court intended to vary the bright-line rule it adopted for federally-granted rights-of-way simply because an accident occurred at the intersection of the right-of-way with a tribal road. Nor should it make any difference, as a logical matter. The right-of-way maintains its character as such even when it is crossed by a tribal road. In this case, BN was undoubtedly operating on the right-of-way when the accident

occurred: so long as the train was on the tracks, it was, by definition, located on the federally-granted right-of-way.[5]

Respondents also contend that this case falls outside the *Montana* analysis because the plaintiffs' decedents were members of the Crow Tribe, while the plaintiff in *A-1 Contractors* was only a relative of tribal members. But the analysis in *A-1 Contractors* makes clear that the *plaintiff's* relationship to the tribe is irrelevant; what is controlling is the character of the land where the accident occurred and the fact that the *defendant* is not a member of the tribe. *See* 117 S.Ct. at 1407, 1408 ("tribal courts may not entertain claims *against nonmembers* arising out of accidents on state highways, absent a statute or treaty authorizing the tribal to govern the conduct of *nonmembers* on the highway in question") (emphasis added).

b. The second step in the jurisdictional analysis adopted in *A-1 Contractors* is to determine whether there is an explicit Congressional grant of jurisdiction to the tribe that would contravene the ordinary presumption against tribal court jurisdiction over the activities of non-Indians on land like the railroad right-of-way. 117 S.Ct. at 1413. As demonstrated in BN's Petition, there is no treaty or statutory provision granting the Crow Tribe the right to adjudicate claims arising out of crossing accidents. Respondents try to wring a grant of authority out of a provision in the 1889 Act establishing the right-of-

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[5] Like the petitioners in *A-1 Contractors*, respondents here also rely on the tribe's purported power to tax activities on the right-of-way, citing *Burlington Northern RR Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). *See* Pl. Opp. at 13; Petitioners' Opening Brief in *A-1 Contractors* at 21-22. The *Blackfeet* decision, however, was based on a very different kind of analysis than the Court adopted in *A-1 Contractors*. Thus, even if that decision has some continuing viability in the tax context, it is entirely irrelevant in deciding whether the tribal court has jurisdiction over accidents on the railroad right-of-way.

way that required the railroad to be operated with "due regard for the rights of the Indians." Pet. App. 44a. But respondents fail to point out that the "due regard" provision is followed immediately by the statement that the railroad was to be constructed and operated "in accordance with such rules and regulations as the Secretary of the Interior may make to carry out this provision." *Id.* The only conclusion that can be drawn from this language is that the *federal government* was responsible for regulating the railroad's conduct and enforcing whatever obligations it owed to the Tribe; there is absolutely no indication in the Act that Congress intended the Tribe itself to regulate the operation of an interstate railroad or to adjudicate claims arising out of crossing accidents.

c. In a personal injury action, the jurisdictional analysis adopted in *A-1 Contractors* is complete once the court determines that (i) the nonmember defendant was traversing the reservation on a federally granted right-of-way and (ii) "it is plain that no federal grant provides for tribal governance of nonmembers' conduct" on that right-of-way. 117 S.Ct. at 1416 n.14. Although *Montana* recognizes two possible exceptions to the presumption against tribal jurisdiction over such conduct, the Court's opinion in *A-1* Contractors makes clear that those exceptions will rarely, if ever, apply in a personal injury action. *See* 117 S.Ct. at 1416 n.14 (stating that when it is "plain that no federal grant provides for tribal governance of nonmembers' conduct on land covered by *Montana's* main rule, it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct").

In any event, under the analysis in *A-1 Contractors,* it is clear that the *Montana* exceptions do not apply here. Respondents argue that the first exception (for claims arising out of consensual relationships) applies because BN was required to obtain the tribe's consent for the right-of-way. But, as *A-1 Contractors* itself demonstrates, a consensual relationship between the tribe and the defendant does not create tribal court

jurisdiction; instead, there must be a consensual relationship between the plaintiff and defendant—a factor that is almost always missing in a personal injury case. *See id.* at 1415.

Respondents also rely on a "health and welfare" rationale, claiming that the railroad has been responsible for the deaths of 25 members of the Tribe.[6] *A-1 Contractors*, however, makes clear that safety concerns cannot support the exercise of tribal jurisdiction over the conduct of nonmembers on a federally-granted right-of-way. Thus, the Court recognized that careless driving would "surely jeopardize the safety of tribal members," yet found no basis for tribal court jurisdiction as a result of that threat. 117 S.Ct. at 1415. Instead, the Court held that the second *Montana* exception would support tribal court jurisdiction only where it was necessary "to protect tribal self-government or to control internal relationships" or to "preserve 'the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* at 1416. Those interests are not implicated here any more than they were in *A-1 Contractors*.

Respondents' attempt to delve into the details of this case supports, rather than avoids, the need for a vacating and remanding the judgment below. Neither the district court nor the Ninth Circuit had an opportunity to consider the impact of this Court's decision in *A-1 Contractors*. While BN believes that the absence of tribal court jurisdiction is clear under *A-1 Contractors*, analysis of the various factual distinctions asserted by respondents is properly handled, in the first instance, in those federal courts.

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[6] Plaintiffs' claims of 25 other fatalities are exaggerated; moreover, there is not a shred of evidence to suggest that BN was responsible for the deaths that did occur. In any event, for the reasons outlined below, plaintiffs cannot use their claims of negligence to bootstrap themselves into a finding of tribal court jurisdiction.

CONCLUSION

Respondents argue that the Crow courts should decide, in the first instance, whether and to what extent *A-1 Contractors* is controlling.[7] Under footnote 14 of *A-1 Contractors*, however, it is the *federal* courts that must decide whether the lack of subject matter jurisdiction is so plain that any exhaustion requirement must give way. Moreover, for all the reasons outlined above, this Court's flexible approach to the issue of tribal court exhaustion in *A-1 Contractors* is fundamentally at odds with the Ninth Circuit's rigidly mechanical application of that doctrine. Because neither the district court nor the Ninth Circuit had the benefit of this Court's decision in *A-1 Contractors*, the Court should grant BN's petition or grant, vacate and remand to the Ninth Circuit to allow reconsideration in light of the intervening change in circumstances.

Respectfully submitted.

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[7] A recent scheduling order issued by the Crow Court of Appeals suggests that it has already prejudged the outcome of the jurisdictional debate. While directing the parties to address the applicability of *A-1 Contractors*, the Court stated in a footnote that "[b]ased on our initial reading, Tribal Court jurisdiction is not controlled in this case by the Court's recent decision in *Strate v. A-1 Contractors*." (Arneson App. 2a).